

The opinion in support of the decision being entered today was *not* written for publication and is *not* binding precedent of the Board.

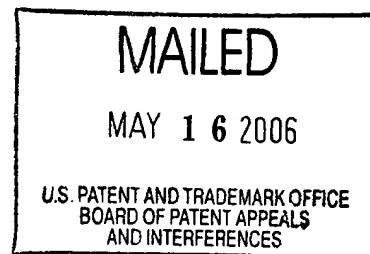
UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex Parte CHRISTINE L. CORRIVEAU
and GWENDOLYN GRAFF

Appeal No. 2005-1582
Application No. 09/682,176

ON BRIEF



Before WARREN, TIMM and JEFFREY T. SMITH, *Administrative Patent Judges*.

JEFFREY T. SMITH, *Administrative Patent Judge*.

Decision on appeal under 35 U.S.C. § 134

Applicants appeal the decision of the Primary Examiner rejecting claims 1-26, all of the pending claims.¹ We have jurisdiction under 35 U.S.C. § 134.

¹ The claims on appeal were presented in the amendment filed January 23, 2004. A copy of these claims is attached to the Reply Brief filed April 4, 2005.

BACKGROUND

Appellants' invention relates to a tableted gum and a method of producing the same comprising a gum component including one or more rectangular shaped gum chips. Claims 1, 12 and 15 are illustrative:

1. A tableted gum comprising:
 - a gum component including one or more rectangular shaped gum chips; and
 - a tableting media wherein the tableting media has an average particle size that is smaller in size than the average particle size of the gum chips, the tableted gum having a non-homogeneous distribution of the gum component and the tableting media.
12. A gum comprising a mixture of rectangular gum chips and tableting media in a tableted form, the gum having a non-homogeneous distribution of the gum chips and tableting media, and wherein the gum chips have an average particle size greater than the average particle size of the tableting media.
15. A method of producing a tableted gum comprising the steps of:
 - providing a gum component;
 - processing the gum component to form one or more rectangular shaped gum chips;
 - mixing the gum chips with a tableting media wherein the tableting media has an average particle size that is smaller in size than the average particle size of the gum chips; and
 - processing the mixture of gum chips and tableting media to form a non-homogeneous distribution of the gum component and the tableting media in the tableted gum.

CITED PRIOR ART

As evidence of unpatentability, the Examiner relies on the following references:

Cherukuri et al. (Cherukuri)	4,753,805	Jun. 28, 1988
Ream et al. (Ream)	5,318,784	Jun. 07, 1994
Athanikar et al. (Athanikar)	6,322,828	Nov. 27, 2001

The Examiner entered the following rejections:

- I. Claims 1-7, 9-15, 17, 18, and 21-26 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Cherukuri.
- II. Claims 1-26 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Ream in view of Cherukuri or Athanikar.
- III. Claims 8, 16, 19, and 20 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Cherukuri in view of Ream.

We have carefully reviewed the claims, specification and applied prior art, including all of the arguments advanced by both the Examiner and Appellants in support of their respective positions. This review leads us to conclude that the Examiner's § 103 rejections are well founded. Our reasons follow.

Rather than reiterate the conflicting viewpoints advanced by the Examiner and the Appellants concerning the above-noted rejection, we refer to the Answer and the Briefs.

OPINION

Claims 1-7, 9-15, 17, 18, and 21-26 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Cherukuri.²

The Examiner found that Cherukuri discloses preparing a tableted chewing gum including gum particles of 4 mesh (about 6mm) and composed of about 50% gum base and about 50% powered sweetener; and adding 2% magnesium stearate lubricant, a colorant, about 5% dry powdered active agent and about 3% powdered flavoring which is formed into a tablet by compressing the components. According to the Examiner, the powdered active agent or flavoring includes particles smaller than the 6 mm gum particles used therein and is equivalent to the claimed tableting media. The Examiner asserts that the distribution of gum component and tableting media is non-homogeneously present in the gum of the Cherukuri since the flavoring and/or active agent particles are of a smaller size than the gum particles. The Examiner asserts, referencing page 6 of the specification, that the gum particles of Cherukuri are of the same size as the claimed gum chips. (Answer, p. 3).

Appellants argue that Cherukuri lacks tableting media having an average particle size that is smaller in size than the average particle size of the gum chips because

² Appellants have not presented arguments separately for each of the appealed claims. For this rejection, the Appellants have grouped the arguments together for claims 1, 12 and 15. We select claim 1 as representative of the rejected claims.

Cherukuri is silent as to the size of its tableting media/compression aid. (Brief, pp. 4-5).

Cherukuri exemplifies the gum granules can have a size of about 4 mesh. (Col. 10). Cherukuri also disclose the gum granules are mixed for tableting with components equivalent to the claimed tableting media that are in powdered form. A person of ordinary skill in the art would have reasonably expected that particles present in powdered form are smaller than granules having a size of about 4 mesh. We note that Appellants have not argued that powdered sized particles are larger than 4 mesh.

Appellants also argue that Cherukuri lacks non-homogeneous distribution of the gum component and the tableting media because Cherukuri is silent with respect to the distribution of its gum component with respect to its tableting media/compression aid. (Brief, p. 5).

Appellants' argument is not persuasive. Regarding the non-homogenous characteristic of Appellants' invention the specification states:

As compared to typically known tableted gum formulations, the mixture of the gum component and tableting media of the present invention, when processed, necessarily results in less sticking or adhering of the mixture to the tableting process equipment. It is believed that this is due to the fact that the tableting mixture of the present invention contains a non-homogenous blend of tableting media and gum chips that have a larger average particle size than the average particle size of the tableting media. As compared to typical tableting mixtures which contain a homogeneously-sized mix of gum and tableting powder, the overall surface area of the tableting mixture of the present invention is smaller than that of known tableting mixtures due to the presence of the larger-sized gum chips. With a smaller surface area, less sticking of

the mixture to the surface of the tableting process equipment would necessarily result upon processing the tableting mixture by punching, pressing or other like processes as detailed below.

It should be appreciated that the present invention is not limited by the size characteristics of the gum chips and the tableting media to the extent that the gum chips are larger in size than the particles of the tableting media, such as powder-sized particles of a tableting powder. In an embodiment, the average particle size of the gum chips ranges from about 0.5 millimeters (mm) to about 6.0 mm. The gum chip particles can be formed by any suitable process, preferably a chipping process, as detailed below. It should be appreciated that the particle size, unless indicated otherwise, is based on the maximum dimension of the particle. [Specification, paragraphs 0032 and 0033].

As stated above, Cherukuri exemplifies gum granules having a size of about 4 mesh that are mixed with powdered sized tableting media. As such, the size of the gum chips is larger than the particles of the tableting media. Based upon the description appearing in the specification, Cherukuri contains a non-homogenous blend of tableting media and gum chips because the gum chips have a larger average particle size than the average particle size of the tableting media.

Appellants argue that “[i]n *Cherukuri* the bulk of the powdered sweeteners are included in the gum formulations prior to grinding. Thus, the sweeteners are in particles of exactly the same size as the *Cherukuri* gum particles. (See Example V)”. (Brief, p. 5).

This argument is not persuasive. Cherukuri exemplifies the gum granules having a size of about 4 mesh that are mixed with powdered sized tableting media. (See Examples 1-3). The sweeteners added during the formulation of the gum particles are

distinct from the sweeteners that are mixed with the gum particles to form the tableted gum. That is, the gum particles are composed of sweeteners mixed with the gum base (these utilized sweeteners are no longer separate from the base). Thus, the components formulated into gum particles are distinct from the components subsequently added to form the tableted gum.

Claims 1-26 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Ream in view of Cherukuri or Athanikar.³

The Examiner found that Ream discloses preparation of a chewing gum product that comprises forming gum chips having a size of 0.5 to 6 mm. The gum chips are mixed with powdered sweetener confection. Ream discloses a colorant is added to change the color of the sweetener. (Col. 5, ll. 28-35). Ream discloses that the gum particle and free flowing powdered sweetener confection are combined prior to packaging. (Col. 6, ll. 29-45). The Examiner relies on the Cherukuri and Athanikar references for teaching that it was obvious to prepare a chewing gum tablet from a chewing gum composition including particles and sweetener. (Answer, pp. 4-5). The Examiner further asserts that the gum chips and powdered confection have a non-homogeneous distribution. (Answer, p. 5).

³ Appellants have not presented arguments separately for each of the appealed claims. For this rejection, the Appellants have grouped the arguments together for claims 1, 12 and 15. We select claim 1 as represented of the rejected claims.

We agree with the Examiner's obviousness determination. Appellants' arguments are not persuasive. (Brief, pp. 6-8). Appellants have not addressed the Examiner's reasons for citing the Cherukuri and Athanikar references. Rather, Appellants provide their own analysis of the cited references and conclude that there is no motivation to combine the references.

Appellants' argument regarding the non-homologous distribution of the gum particles and tableting media are not persuasive of patentability. As stated above, Ream exemplifies gum chips having a size of 0.5 to 6 mm mixed with powdered confection. As such, the size of the gum chips is larger than the particles of the powdered confection. Based upon the description appearing in the specification (cited above), Ream (like Cherukuri) contains a non-homogenous blend of powder confection and gum chips because the gum chips have a larger average particle size than the average particle size of the powder confection.

Moreover, the addition of the teachings of the Ream and Athanikar references to the teachings of Cherukuri, do not detract from our determination that the subject matter of independent claims 1, 12 and 15 would have been obvious to a person of ordinary skill in the art over the teachings of Cherukuri alone discussed above.

Claims 8, 16, 19, and 20 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Cherukuri in view of Ream. Appellants in the Brief did not present

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separate arguments for patentability of these claims. However, in the Reply Brief the Appellants argue that Ream does not disclose a tableted gum and is therefore the combination of Ream and Cherukuri is not appropriate. (Reply Brief, pp 2-3). Appellants' arguments are not persuasive for the reasons stated above in our discussion of the Ream and Cherukuri references.

CONCLUSION

For the foregoing reasons and those set forth in the Answer, giving due weight to Appellants' arguments, we determine that the preponderance of evidence weighs in favor of affirming the Examiner's rejections. Accordingly, the Examiner's rejections under 35 U.S.C. § 103(a) are affirmed.

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Application No. 09/305,865

Time for taking action

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a)(1)(iv) (2004).

AFFIRMED

Robert F. Warren
ROBERT F. WARREN

CHARLES F. WARREN
Administrative Patent Judge

Catherine M

CATHERINE TIMM
Administrative Patent Judge

Mary E. Smith

JEFFREY T. SMITH
Administrative Patent Judge

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